SUPREME COURT OF FLORIDA

NO.: SC08-774

LOWER TRIBUNAL CASE NOS.: 4D07-1055

MANZINI & ASSOCIATES, P.A.,

Petitioner,

vs.

BROWARD SHERIFF'S OFFICE
and SONYA D. WIMBERLY,

Respondents.
_____/

On Discretionary Review to the
District Court of Appeal of Florida, Fourth District

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner Manzini & Associates, P.A. ("Manzini") respectfully requests discretionary review of the Fourth District's opinion affirming the circuit court's final order dismissing respondent Sonya D. Wimberly's ("Wimberly") civil rights action against respondent Broward Sheriff's Office ("BSO").

The Fourth District's opinion was filed on March 19, 2008 and rendered that same day by its denial of Manzini's motion for "rehearing" (in point of fact, Manzini did *not* move for rehearing but merely asked the Fourth District to issue a written opinion after its *per curiam* affirmance of the circuit court's order of dismissal and final judgment).

The jurisdiction of this Court to review the Fourt District's opinion on a discretionary basis is invoked under article V, section 3(b)(3) of the Florida Constitution.

On April 1, 2003, Wimberly, an 18-year BSO employee and detention sergeant, retained Manzini to act as her legal counsel to prosecute her civil rights claims against BSO arising out of the termination of her employment in 2002. On May 1, 2003, Manzini filed Wimberly's civil rights action against BSO in the Broward County Circuit Court. Depositions of Wimberly and other witnesses were taken and extensive written discovery was conducted in the case. A motion for summary judgment was filed by BSO but was never disposed of.

Prior to September 29, 2006, Manzini had taken the deposition of Major Michael Goldstein, BSO's human resources director and the chief decisionmaker in this retaliatory discharge case and had scheduled the depositions of other BSO representatives. Manzini actively litigated the case for approximately three years and had filed a motion for leave

to amend Wimberly's complaint that was scheduled for hearing before the circuit court (Honorable Barry E. Goldstein) on October 16, 2006.

On September 29, 2006, Manzini was advised by BSO's counsel in a letter that, unbeknownst to Manzini, Wimberly had entered into a "Severance Agreement and Release" with BSO and non-party Broward County on May 23, 2006 whereby she had received approximately $129,000.00 from BSO and had purportedly waived all of her claims against BSO (including those asserted in her civil rights action) as part of a settlement of her workers' compensation claim against BSO.

Thereafter, on October 2, 2006, BSO's counsel sent a second letter to Manzini making numerous representations about the events that resulted in BSO and Wimberly's execution of the "Severance Agreement and Release" without Manzini's knowledge or consent.

Both letters from BSO's counsel demanded the immediate dismissal of Wimberly's action against BSO and threatened the imposition of sanctions against Manzini and Wimberly if Wimberly failed or refused to do so.

After receiving the two letters from BSO's counsel, Manzini investigated the matter in comprehensive detail and had reason to believe that a fraud was perpetrated upon Manzini when Wimberly and BSO entered into the so-called "Severance Agreement and Release" as part of her workers' comp settlement with BSO.

Shortly thereafter Manzini filed a motion in the circuit court seeking permission to continue Wimberly's civil rights action against BSO for Manzini's benefit. Before the evidentiary hearing on that motion, Manzini formally withdrew as Wimberly's counsel.

At the evidentiary hearing before Judge Goldstein, Wimberly testified that she did not intend to discharge Manzini as her lawyer when she signed the "Severance Agreement and Release" and that she did not realize that her workers' comp settlement precluded the continuation of her civil rights action against BSO. Wimberly's workers' comp lawyer testified he was unaware Wimberly had a pending civil rights action against BSO or that she was being represented by Manzini. In turn, Wimberly insisted she had informed her workers' comp lawyer about her pending civil rights action and about Manzini.

BSO's position before Judge Goldstein was that its representatives involved with the settlement of Wimberly's workers' comp claim were unaware she had a pending civil rights action against BSO, a classic "one hand doesn't know what the other is doing" argument that was undercut by the all-inclusive nature of the release Wimberly was asked by BSO to sign and did sign.

Moreover, at the hearing before Judge Goldstein on Manzini's motion, evidence was also presented that a similar case brought by a BSO co-worker of Wimberly's who had been referred by Wimberly to her workers' comp lawyer was settled at a global mediation upon the co-worker's execution of a "Severance Agreement and Release" like the one signed by Wimberly. Coincidentally, the mediation conference in that similar case was attended by the *same* lawyer who represented BSO in Wimberly's civil rights action and by the *same* lawyer who represented Wimberly in her workers' comp case against BSO, as well as by other BSO representatives.

Prior to September 29, 2006, Manzini invested substantial time, effort and expense in representing Wimberly in her civil rights action against BSO and the practical

effect of the fraud perpetrated upon Manzini by Wimberly and BSO was to defeat Manzini's entitlement to recover attorney's fees and costs from BSO and/or from the proceeds of the settlement that was reached surreptitiously by Wimberly and BSO, which proceeds were paid by BSO to Wimberly before Manzini discovered the fraud render. Under the Florida Civil Rights Act, section 760.11(5), Florida Statutes, Manzini was entitled to recover its reasonable attorney's fees and costs from BSO if Wimberly prevailed in her civil rights action against BSO.

On February 27, 2007, Judge Goldstein denied Manzini's motion for permission to continue Wimberly's civil rights action against BSO for its benefit and entered a final order dismissing the case. Manzini appealed Judge Goldstein's order to the Fourth District.

On August 13, 2007, while Manzini's appeal was pending before the Fourth District, Judge Goldstein unexpectedly disclosed to the parties that BSO's human resources director and the chief decisionmaker in this wrongful termination case (Major Goldstein) is his brother. Judge Goldstein then recused himself.

Based upon Judge Goldstein's recusal, Manzini promptly filed a motion in the Fourth District asking that court to relinquish its jurisdiction to the circuit court pursuant to Florida Rule of Appellate Procedure 9.600 (b) for the limited purpose of having the successor judge reconsider Judge Goldstein's order of dismissal and final judgment in BSO's favor, as authorized by Florida Rule of Judicial Administration 2.160 (h). The Fourth District denied Manzini's motion.

On March 19, 2008, the Fourth District issued its written opinion affirming Judge Goldstein's order of dismissal and final judgment. Despite Wimberly's explicit testimony

that she did not intend to discharge Manzini as her lawyer or end her civil rights action against BSO when she executed the "Severance Agreement and Release," and despite the testimony of Wimberly's workers' comp lawyer that he was not even aware of any such civil rights action, the Fourth District held that *"Wimberly . . . discharged Manzini as her counsel in a civil rights action when she chose to settle and release all her claims against . . . BSO, using another attorney, in a workers' compensation case."*

SUMMARY OF ARGUMENT

"Where a client makes a fraudulent or collusive settlement intended to deprive the attorney of his compensation or cost fees, the attorney will be permitted to proceed with the suit in the client's name for the purpose of protecting his interests." *Mabry v. Knabb*, 10 So. 2d 330, 337 (Fla. 1942). The Fourth District's opinion directly conflicts with *Mabry.*

ARGUMENT

Mabry began as a mortgage foreclosure action. Chicago Trust Company employed the law firm Mabry, Reaves and Carlton of Tampa to foreclose a mortgage. The law firm's fee for the foreclosure was not paid and they secured an equitable lien on the lands involved in the foreclosure.

Thereafter, a sale was ordered and the lands were bought by the law firm for Chicago Trust Company. A sale of said lands for taxes was made at the same time and that decree was purchased by the law firm.

After securing title by the foreclosure, Chicago Trust Company leased the lands to L. Knabb for turpentine, timber, wood and tie purposes. The lease required Knabb to make periodic reports and payments for products taken from the lands. Knabb continued

to operate the land under his lease but made no reports or payments for several years thereafter.

Eventually, Knabb brought suit against the trustee of the land owned by Chicago Trust Company and against the law firm (Mabry, Reaves and Carlton) to foreclose tax certificates which Knabb had acquired against the lands while working as a tenant.

The trustee answered through the law firm and alleged that Knabb had not paid for products taken from the land as his lease contract required. He prayed for an accounting and that Knabb be required to pay the amount found due after setting off his tax claim.

The law firm also answered in its own behalf praying that Knabb be required to account to them for the amount of their tax decree.

From a decree granting Knabb the relief he prayed for and denying the law firm the relief they prayed for, an appeal was taken. Following reversal, a master was appointed and testimony taken.

While the taking of testimony was in progress, Knabb moved to vacate the order of reference on the ground that since it was entered, he had made a full and complete settlement with the trustee of the land for all claims held by him. This motion was denied on the ground that the law firm (Mabry, Reaves and Carlton) were entitled to an accounting and to have any unpaid amount against Knabb's claim for taxes against the trustee of the land paid to them.

On a second appeal, the Court stated in pertinent part:

> *"The only question left open for determination is as to the effect the settlement ...between Knabb and [the trustee of the land] had on the right of Mabry, Reaves and Carlton ...to continue prosecution in the name of the trustee for the benefit of these*

> *lawyers to recover the amount alleged to be due them as attorneys fees from the trustee...*
>
> *"As to the balance due Mabry, Reaves and Carlton for services in the original foreclosure suit, we do not think that Knabb is legally liable. That is an obligation due from the trustee with which Knabb was not concerned...*
>
> *"The claim for fees in the instant case, however, presents an entirely different question. Here, [the law firm] undertook the enforcement of the settlement of a rental contract on which the records shows there was a balance due...and while they were engaged in diligently performing that service, the lessee and the lessor entered into a settlement of the claim leaving the attorneys out of consideration.*
>
> *"This was in the face of the fact that the rental contract under which the claim was prosecuted specifically provided: 'and further agrees that should it become necessary to collect by suit or otherwise any of the moneys [sic] falling due hereunder, that he will pay a reasonable attorney's fee and all costs of such proceedings'."*

Id. at 336.

The Court recognized the general rule that parties to an action may settle the same without the intervention of the attorneys and that a plaintiff who has a cause of action against a defendant may release and discharge it upon such terms as are agreeable to her. *Id.* at 337.

Nevertheless, the Court went on to say:

> *"If an attorney has commenced an action and his client settles it with the opposite party before judgment, collusively, to deprive him of his costs, the court will permit the attorney to go on with the suit for the purpose of collecting his costs...."*

Id. at 337.

Accordingly, the *Mabry* Court held:

> *"The parties must be **assumed** to have had the intent to effectuate the result which all parties knew, or should have known, would flow from their conduct. Therefore, it must me **assumed** that both the trustee and Knabb when they made the settlement between themselves consummated the same pursuant to the intent of both parties to deprive the attorneys of their vested rights..."*

(emphasis added) *Id.* at 336.

The law firm in *Mabry* was thus allowed to continue with the pending suit in the name of their client (the trustee of the land) to protect their interests notwithstanding the settlement and exchange of releases between the parties.

In this case, the Fourth District abjectly ignored the ***presumption*** of fraudulent intent on the part of both BSO and Wimberly that *Mabry* holds arises under these circumstances when it ruled:

> *" . . . [T]he trial court [i.e., Judge Goldstein] found that none of the attorneys handling this case were involved in an attempt to defraud Manzini of his fee. Rather, the only person whose intentional actions caused the problem was the client [Wimberly]."*

The *Mabry* decision has not been overruled or modified and is part of the common law of Florida.

At the hearing before the circuit court on Manzini's motion for permission to proceed with Wimberly's suit against BSO to protect its interests, BSO cited *Sentco v. McCulloh*, 84 So. 2d 498 (Fla. 1955) for the proposition that a settlement agreement made without the intervention of plaintiff's counsel was not a "ruse" fraudulently made to deprive them of the full amount of their contingent fee. In its opinion, the Fourth District also discusses *Sentco.*

However, *Sentco* is totally inapposite to the case at bar.

In the first place, unlike the plaintiffs in *Mabry* and this case, the plaintiff in *Sentco* (and by extension its lawyer) was not entitled to recover its attorney's fees ***from the defendants*** if it prevailed as Manzini would have been if Wimberly prevailed in her civil rights action against BSO. The operative agreement between the parties in *Sentco* was strictly a contingency fee agreement between the plaintiff and its counsel, period.

Secondly, in *Sentco*, "the offer of settlement was actually presented to plaintiff's attorneys by counsel for defendants and was by them communicated to plaintiff's president, who at first declined the offer, but later changed his mind." *Id*. at 449.

Thirdly, when plaintiff's president decided to accept the settlement offer,

> *"[H]e appears to have advised his attorneys promptly of his acceptance of the offer. As soon as he received the settlement check from defendants he gave one of his attorneys a check for their portion of the amount of the settlement in accordance with the contingent fee arrangement with them, and the check was cashed by the attorney to whom it was made payable. While it well may be that the amount received by them was an insufficient remuneration for their services in the litigation in question . . . the fact remains that they chose to accept the employment on a contingent basis; they were paid and accepted payment on such a basis . . ."*

Id. at 499. In other words, the ***presumption*** of fraudulent intent in *Mabry* did not arise.

Obviously, *Sentco* is factually and legally distinguishable from the case at bar.

CONCLUSION

For the foregoing reasons, petitioner Manzini respectfully requests that the Court review the Fourth District's opinion based upon direct conflict with *Mabry.*

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is submitted in Times New Roman 12 point font in conformance with the requirements of the Florida Rules of Appellate Procedure.

_____
NICOLAS A. MANZINI, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ___ day of June, 2008 to: **Law Offices of Carmen Rodriguez, P.A**., Attorney for Respondent BSO, Palmetto Bay Centre, 15715 South Dixie Highway, Suite 411, Miami, FL. 33157; and **Sonya D. Wimberly**, Respondent, 7320 Biltmore Boulevard, Miramar, Florida 33023.

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